

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 8, 2009 Session

ANTHONY GILLEY v. LINDA GAYLE GILLEY

Appeal from the Chancery Court for Williamson County
No. 33186 Jeffrey Bivens, Chancellor

No. M2009-00141-COA-R3-CV - Filed January 20, 2010

In this post-divorce action, Husband filed suit for partition of a commercial piece of property owned by him and Wife as tenants in common, over Wife's objection. The trial court ordered partition of the property and awarded each party an equal share of the proceeds of the sale. Wife appeals the court's partition and equal division of the proceeds. Finding that the trial court erred in holding that a provision of the Marital Dissolution Agreement constituted an unreasonable restraint of alienation, that holding is reversed; the order of partition is affirmed on other grounds. Finding that Wife was entitled to a contribution from Husband for maintenance and repair costs incurred on the property, the court's order requiring equal division of proceeds of sale is reversed and the case remanded for a determination of the amounts owed Wife from Husband's share of the sale proceeds.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Lauren M. Spitz, Franklin, Tennessee, for the appellant, Linda Gayle Gilley.

Lauren Paxton Roberts, Gregory D. Smith, Nashville, Tennessee, for the appellee, Anthony Gilley.

OPINION

I. Procedural and Factual Background

Anthony Gilley ("Husband") and Linda Gayle Gilley ("Wife") were divorced on January 15, 2002. The Final Decree of Divorce incorporated a Marital Dissolution

Agreement (“MDA”), which provided for the disposition of a piece of commercial property owned by the parties. On January 11, 2007, Husband filed a Complaint for Sale of Property Pursuant to the Final Decree of Divorce, seeking a partition of the commercial property and an award of fifty-percent of the sale proceeds.¹ Wife filed an answer on March 13, 2007.

According to the brief on appeal of Wife, counsel for the parties participated in a pretrial conference on October 16, 2007 in which limited facts were disclosed; based on those facts, the court indicated its probable rulings.² An order was entered on October 26 providing for the disposition of the former marital residence, ordering the parties to obtain an appraisal on the commercial property and reserving all issues relating to the partition of that property pending the results of the appraisal; the order was signed by both counsel, although it was not denominated an agreed order.³

Following a trial, the court entered an order holding, in part pertinent, that Paragraph 2 of the MDA constituted an unreasonable restraint on alienation and, consequently, could not be enforced to prevent the sale of the property. In the alternative, the court held that, if Paragraph 2 was not an outright restraint, the provision could only be enforced for a reasonable period of time; the court found a reasonable period to be until Wife turned 65 years old and became eligible for Social Security. As Wife was 65 years old at the time of the trial, the court ordered that the commercial property be partitioned by sale, denied Wife’s request for more than a fifty-percent share of the proceeds, and ordered that the provision in the MDA requiring an equal division of the proceeds be enforced. Wife appeals, raising the following issues:

1. Did the trial court err in ordering partition by sale of the commercial property?

¹ Husband’s complaint also sought an order requiring Wife to buy out his interest in a residential piece of property owned by the parties as tenants in common after the divorce pursuant to the MDA. The MDA allowed Wife to live in the home until one of three “terminating events” occurred, one of which was “the expiration of four (4) months subsequent to the death of the last of Wife’s parents.” Wife’s mother passed away in April 2005 and Husband filed his complaint thereafter. Eventually, Wife agreed to purchase Husband’s interest and the disposition of this piece of property is not an issue on appeal.

² In his brief, Husband adopts the statements of the case and of the facts set forth by Wife. *See* Rule 27(b), Tenn. R. App. P.

³ Wife subsequently filed a motion for a substitution of counsel, which was allowed by the trial court. Wife’s new counsel filed a Motion to Set Aside the October 26 order, asserting that Wife’s previous counsel executed the order without authority and against Wife’s express instructions. The trial court entered an order on January 5, 2008, amending, modifying, and deleting certain provisions of the October 26 order, which are not pertinent to this appeal.

2. Did the trial court err in ordering the proceeds from the sale of the commercial property to be equally divided between the parties?
3. Whether the Court of Appeals should award Wife her attorney's fees and expenses incurred on appeal?

II. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 199 S.W.3d at 635.

III. Analysis

A. Partition of the Commercial Property

Paragraph 2 of the MDA states that:

Husband and Wife own as tenants by the entirety certain commercial property...owned free and clear of any mortgage indebtedness thereon. Said real estate is presently leased, and the parties are uncertain as to whether they will continue to lease same or will seek to sell and market same for fair value. Subsequent to the termination of the marriage of the parties, they will continue to own said real estate as tenants in common. Until such time as said real estate is sold and closed, any rental income derived thereon will first be used to satisfy any real estate taxes and insurance obligations associated with the premises, and the remainder thereof will be the individual property of Wife. In the event the parties should elect to sell said real estate, they will cooperate with the other in marketing same under the general format hereinabove referenced in Paragraph 1, Option B,⁴ and any net proceeds derived will be divided equally between Husband and Wife.

Wife asserts that, at the time the parties entered into the MDA, they agreed that she was to receive the rental income from the commercial property in lieu of an award of alimony, that such agreement was "evidence of the purpose of the restraint," and,

⁴ Paragraph 1, Option B, sets forth the method of selling the marital residence in the situation where "Wife does not have an interest in retaining the residence."

consequently, that the restraint on alienation was enforceable pursuant to *McGahey v. Wilson*, No. M2000-01931-COA-R3-CV, 2001 WL 799736 (Tenn. Ct. App. July 17, 2001).⁵ Husband argues that Paragraph 2 contains no restraint on alienation and that, as a tenant in common, he is entitled to partition of the property pursuant to Tenn. Code Ann. § 29-27-101; in the alternative, he contends that, if Paragraph 2 does impose a restraint on alienation, the MDA contains no evidence of the purpose of the restraint sufficient to comply with *McGahey*.

We have determined that the trial court erred in finding that Paragraph 2 of the MDA constitutes an unreasonable restraint on alienation of the commercial property. At no point does the provision suggest that the property cannot be sold or partitioned without the consent of both parties and it does not prohibit the sale of the property by partition or otherwise; rather, Paragraph 2 outlines the steps to be taken “[i]n the event the parties should elect to sell [the commercial property].” Indeed, the language that “the parties are uncertain as to whether they will continue to lease same or will seek to sell and market same for fair value” suggests that the parties were contemplating the sale of commercial property at the time they entered into the MDA. Further, the plain language of Paragraph 2 does not support Wife’s contention that the paragraph constituted a contract between Husband and her that the property would not be sold absent mutual consent or to operate as a waiver of either party’s right under Tenn. Code Ann. § 29-27-101, *et seq.*⁶

Consequently, the court’s holding that Paragraph 2 constitutes an unreasonable restraint on alienation is reversed. The trial court’s order to sell the property is affirmed pursuant to Husband’s statutory right to obtain such a partition under Tenn. Code Ann. § 29-27-101.

B. Division of the Proceeds from the Sale of the Commercial Property

“Where jointly held property is sold, the sale proceeds are to be divided between the parties in accordance with their rights as determined by the court.” *Parker v. Lambert*, 206 S.W.3d 1, 4 (Tenn. Ct. App. 2006) (citing Tenn. Code Ann. § 29-27-217 (2005)). When one cotenant carried a greater share of the financial burden of the property, an equal division of partition-sale proceeds is “contrary to well settled principles governing when one cotenant

⁵ Both parties primarily rely on *McGahey* in support of their arguments on appeal and agree that the opinion is controlling in this matter.

⁶ For these reasons, both the trial court’s and Wife’s reliance on *McGahey* is misplaced and it is not necessary to address the trial court’s alternative finding regarding a reasonable time period for upholding the restraint on alienation.

is entitled to compensation from another cotenant.” *Id.* at 4-5. “The common theme of these principles is that a cotenant must equally share both the burdens of the land ownership...as well as the benefits of the land ownership.” *Id.* at 5.

In its final judgment, the trial court ordered that the “provision of the [MDA] requiring a 50/50 split of the proceeds be enforced.” Wife asserts that, if partition of the commercial property is affirmed, she is “entitled to a greater share of the proceeds of the sale of the commercial property to compensate her for bearing a disproportionate share of the burden of preserving, maintaining and improving the property.” Specifically, she contends that she “paid *all* of the expenses for the commercial property, including the insurance, property taxes, and maintenance and repairs” and that Husband “did not pay any of these expenses for the commercial property.” (Emphasis in original). Husband does not deny that he did not contribute to these expenses.

In support of her argument, Wife relies upon the factors set forth by this Court in *Parker v. Lambert*, 206 S.W.3d 1 (Tenn. Ct. App. 2006), which govern when a cotenant is entitled to compensation from another cotenant:

The are [sic] five primary principles governing compensation in the partition context. First, the courts will compensate a cotenant who improved the jointly owned property as long as the improvements enhanced the property’s value. . . . Second, cotenants must equally contribute to satisfying encumbrances on the property. Third, cotenants must also equally contribute to expenses for necessary repairs and maintenance of the jointly owned property. . . . Fourth, a cotenant with sole possession of the property is liable to other cotenants for any profits received in excess of his or her pro rata share. Fifth, a cotenant with sole possession of the property who has excluded his or her cotenants from the property or who has denied their title to any part of the property, must pay rent to the cotenants for the use and occupation of the property regardless of the profits received.

Id. at 5, n.2 (internal citations omitted).

We find that the trial court erred in applying the provision requiring an equal division of the proceeds of sale of the commercial property. While Paragraph 2 states that “any net proceeds derived will be divided equally between Husband and Wife,” that language is included in that sentence that applies “in the event the parties should elect to sell [the commercial property].” The parties have not agreed to sell the property, rather Husband is exercising his rights under Tenn. Code Ann. § 29-27-101, *et seq.* and retains the obligations imposed upon him as cotenant. The particular language of Paragraph 2, consequently, is not

applicable and the equal division of the proceeds is not contractually required. Rather, the proceeds from the partition sale will be divided “in accordance with [the parties’] rights as determined by the court.” *Parker*, 206 S.W.3d at 4; Tenn. Code Ann. § 29-27-217.

Applying the factors in *Parker*, Wife is entitled to compensation for one-half of the amount expended on the maintenance and repair of the commercial property.⁷ Husband is responsible for one-half of the maintenance and repair costs as a tenant in common, but not for the tax and insurance burdens incurred on the property, which the parties agreed would be satisfied by the rental income. Consequently, the proceeds from the partition sale are to be equally divided between the parties, with Wife entitled to recoup one-half of the costs of maintenance and repair from Husband’s share of the proceeds. Since the amount of the maintenance and repair costs is not in the record, it is necessary to remand the case for a determination of the amount of such costs.

C. Attorney’s Fees on Appeal

Wife asserts that the MDA authorizes an award of attorney’s fees to her for this appeal if she is successful. Husband contends that “the attorney’s fee provision in the MDA does not apply to this matter, as neither party is seeking enforcement of a provision of the MDA through this appeal.”

Paragraph 17 of the MDA states that:

In the event that it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provision of this agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney’s fees, incurred in prosecuting said action, discretion regarding the payment of said amount to remain with the court.

⁷ In regard to the first and second factors set forth in *Parker*, there is no evidence in the record that Wife made any improvements to the property and the MDA states that the property is “owned free and clear of any mortgage indebtedness.” In regard to the third factor, the uncontested evidence at trial was that Wife paid the “insurance, property taxes, and maintenance and repairs” on the property; also the MDA states that the rental income was to be “used to satisfy any real estate taxes and insurance obligations associated with the premises.” We do not find the fourth and fifth factors to be applicable since Wife was never granted “sole possession” of the property; the MDA only states that she was entitled to the rental income therefrom. In any event, Husband forfeited any right to obtain profits from the commercial property by agreeing to give Wife the rental income therefrom and there was no evidence that he was ever excluded from the property.

We find that Wife is not entitled to an award of attorney's fees. Pursuant to Paragraph 17, attorney's fees are only available to the "prevailing party"; Wife prevailed only in obtaining an award against Husband for contribution of expenses as tenant in common, which was not an action brought pursuant to the MDA. Furthermore, Husband asserted in his complaint that "[t]here were no conditions set forth in the [MDA] which gave [Wife] the right to have the [commercial property] sold or his interest purchased. Instead, this property is owned jointly by the parties and is subject to sale for partition as provided in T.C.A. 29-27-101, et. seq." Thus, Husband's claim regarding the commercial property was brought pursuant to his statutory right to partition and not under a provision of the MDA. Tennessee follows the American Rule, which allows a party to recover attorneys' fees for work done on claims that carry a contractual, statutory, or equitable right to recover such fees. *Whitelaw v. Brooks*, 138 S.W.3d 890, 893 (Tenn. Ct. App. 2003). In the absence of such right, Wife is not entitled to an award of fees.

IV. Conclusion

For the reasons set forth above, the finding of the Chancery Court that Paragraph 2 of the Marital Dissolution Agreement constituted an unreasonable restraint on alienation is REVERSED; the order of the court ordering the partition and sale of the property is AFFIRMED; the case is REMANDED for a determination of the amounts owed to Wife from Husband for maintenance and repair costs.

Costs of this appeal are assessed against equally between the parties.

RICHARD H. DINKINS, JUDGE